SII TOH SING

v.

HUNG MING CHUNG

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[CIVIL APPEAL NO: 12-8 OF 1998]
21 JANUARY 2000

CIVIL PROCEDURE: *Appeal - Record of Appeal - Order 49 r. 6(3)(d) Subordinate Courts Rules 1980 - Meaning of "decision"- Whether means sealed judgment - Whether copy of draft order suffices - Whether rule mandatory*

CIVIL PROCEDURE: *Preliminary objection - Notice to opponent - Whether must be given - Preliminary objection on point of law - Whether goes to root of proceedings - Illegality - Jurisdiction of court*

The appellant filed an appeal against the decision of the Sessions Judge dismissing his application for summary judgment. On the day fixed for the hearing of the appeal, counsel for the respondent raised a preliminary objection that the record of appeal was defective for failure to comply with the requirements of O. 49 r. 6(3)(d) Subordinate Courts Rules 1980, since it did not contain a copy of the decision of the court appealed from, but a copy of the draft order. The case was adjourned to another date. Counsel for the appellant submitted that the appellant had no prior notice of the preliminary objection.

Held:

[1] Although the hearing was adjourned to another date, the court would consider that no notice of the preliminary objection was given as it was raised on the first date fixed for the hearing.

[2] A preliminary objection on a point of law can be raised even though no prior notice of it is given as any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. The court cannot condone illegality simply because no prior notice of a preliminary objection is given.

[3] The word "decision" in O. 49 r. 6(3)(d) Subordinate Courts Rules 1980 can only mean a sealed judgment, *ie*, a judgment that has been drawn and entered in accordance with O. 29 rr. 9 & 10 Subordinate Court Rules 1980.

[4] Order 49 r. 6(3) Subordinate Court Rules 1980 is mandatory in its terms by reason of the word "shall" used in it.

[Preliminary objection upheld; appeal dismissed.]

Case(s) referred to:

Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases [1996] 3 CLJ 263 ***(foll)***

Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 ***(foll)***

Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Bhd [1996] 2 CLJ 130 ***(refd)***

Wong Sing Ha v. Yii Ching King (Civil Appeal No 20-12-13 of 1996; High Court, Sibu) ***(refd)***

Legislation referred to:

Rules of the Court of Appeal 1994, r. 18(4)

Subordinate Courts Rules 1980, O. 29 rr. 9, 10, O. 49 r. 6(3)(d)

For the appellant - John Shek; M/s John Shek & Co

For the respondent - Wong Ho Leng; M/s Wong Ho Leng & Co

Reported by Izzaty Izzuddin

JUDGMENT

Tee Ah Sing J:

This is an appeal by the appellant against the decision of the learned Sessions Court judge whereby the appellant's application for summary judgment was dismissed with costs to be taxed unless agreed.

On 9 August 1999 the learned counsel for the respondent indicated to the court and the learned counsel for the appellant that there will be a preliminary objection on the same matter as in Civil Appeal No. 11-2-99.

The learned counsel for the appellant submitted that there is a procedure that if there is any preliminary objection, notice in writing must be served on the other side.

This case was adjourned to 13 September 1999 for hearing as the learned counsel for the appellant has requested for an adjournment in Civil Appeal No. 11-2-99.

On 13 September 1999 the learned counsel for the respondent stated that he was raising a preliminary objection. On 9 August 1999 he had indicated to the court and the learned counsel for the appellant that he will be raising a similar preliminary objection as in the case previously, ie, Civil Appeal No. 11-2-99. He further contended that on 10 August 1999 he sent a letter

to the appellant's solicitors to inform the appellant that during the next hearing on 13 September 1999 the respondent would be raising a preliminary objection that the record of appeal is incomplete and defective for failure to include the sealed judgment.

He submitted that even if no notice was given, if the court has no jurisdiction because the appeal is incompetent that is the end of the matter.

His objection dwells on the failure of the appellant to include the decision appealed from in the appeal record. At pp. 49 to 50 of the appeal record only a draft order was incorporated. It was neither signed by or approved by the advocates for the respondent nor by the Registrar of the Subordinate Courts. This is in breach of O. 49 r. 6(3)(d) of the Subordinate Courts Rules 1980 ("the SCR"). A draft order or judgment is not the decision appealed from as envisaged in O. 49 r. 6(3)(d) of the SCR. In support the following cases were cited:

(1) *Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Berhad* [1996] 2 CLJ 130.

(2) *Mat Yassin bin Dollah v. Ibrahim bin Hussin & Anor*. [1996] 4 CLJ 395; [1997] 2 MLJ 681.

(3) *Wong Sing Ha @ Wang Ha Hing (trading as Ying Nang Company) v. Yii Ching King (trading as Soon Kwong Shipping Company)* – Sibu High Court Civil Appeal No. 20-12-13 of 1996 (unreported).

The learned counsel for the appellant submitted that the only thing for this court to decide is whether the objection raised by the respondent on 9 August 1999 was good or bad when there was no written notice being given to the appellant in view of the authorities cited by him in the submission of the Civil Appeal No. 11-2-99.

He denied receiving the letter dated 10 August 1999 pertaining to the preliminary objection.

He adopted his submissions as given in Civil Appeal No. 11-2-99.

I shall now deal with the preliminary objection. For this purpose I would accept the contention of the appellant that he did not receive the written notice given on 10 August 1999. The preliminary objection was only raised during the date of hearing itself on 9 August 1999. Although the hearing was adjourned to 13 September 1999 and the learned counsel for the respondent on 9 August 1999 has indicated to the court and the learned counsel for the appellant that he will be raising a preliminary objection at the next hearing, I would treat this as not being notice given. In other words, I would treat that the preliminary objection was only raised at the hearing on 13 September 1999.

In *Datuk Bandar Kuala Lumpur v. Seman bin Amat & 2 Other Cases* [1996] 3 CLJ 263 His Lordship Abdul Kadir Sulaiman J at p. 266 said:

> Before the formal hearing of the three appeals, the learned counsel for the respondents, En. Karpal Singh raised a preliminary objection on a point of law in that as the various appeals of the appellants were filed in the registry of the Subordinate Court the appeals are not properly brought before the High Court being in contravention of O. 49 r. 6 of the SCR. It is contended that the notices of appeal were not filed in the proper registry as required by the said r. 6. Rather unfortunate, however, no prior notice of the intention to raise the preliminary objection was given by the respondents to the appellants except for the indication given to their learned counsel orally just before the commencement of the hearing of the appeals.

And at p. 267 he said:

> In opposition, the learned counsel for the appellants cited *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor*. [1985] 1 MLJ 394. In that case the sole question for decision of the court concerned the meaning and ambit of the phrase "entered for hearing" in O. 53 r. 2 of the Rules of the High Court 1980 (the RHC). It arose on a preliminary objection taken by the respondent without any prior notice given to an application by the applicant for an order of *certiorari*. By way of observation his Lordship at p. 396 said:
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> > Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson, CJ in *Gurbachan Singh v. Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.
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> However, in that case, even though no prior notice was given, the learned Judge heard the preliminary objection of the respondent though for lack of merit he dismissed the objection raised.
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> In *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] 28 MLJ 370, the respondents upon the service of the notice of appeal by the appellant out of the time period prescribed, issued "Notice of Preliminary Objection" in writing to the appellant that on the hearing of the appeal which was to take place in about 31/2 months from then, he would apply for the appeal to be dismissed on the grounds that they were not served with the notice of appeal within the time limited for appeal whereby the appellant was in breach of the then O. 58 r. 1A(1), O. 58 r. 2 and O. 58 r. 15 of the RSC 1957. The then Court of Appeal allowed the preliminary objection and the appeal by the appellant was struck out with costs to the respondent. At p. 371 Thomson CJ has this to say:

> Before departing from the case I should observe that the procedure followed by the respondents, that is to say giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *In re Helsby*.

And at p. 268 he said:

> In that light I would agree with the submissions made by En. Karpal Singh, the learned counsel for the respondents, that the observations made in the two cases cited are merely *obiter*, as the two Courts were deciding on the issue raised in the two respective preliminary issues. Furthermore, the learned Judge in *Jasabena's* merely expressed that it was unfortunate that the respondent in that case had raised the objection without any prior notice. In my view, it is a good practice for a party intending to raise any preliminary objection to do so by giving prior notice in writing to avoid any further argument as to whether in fact any notice at all ever given and that the notice if given must be with prior notice so that the other party would not be taken by surprise. The opponent must be given the opportunity to prepare himself to answer to the objection to be raised. This objective is achieved by him being given ample notice of the nature of the objection to be raised. In this present case, though an eleventh hour oral notice was given, the learned counsel for the respondent is not pressing for an immediate reply to the objection to be raised. He is prepared to allow time for the learned counsel for the appellant to do so which the learned counsel, however, did not avail the opportunity given but instead gave his reply straightaway. Therefore, he cannot any more say that he was taken by surprise by the eleventh hour oral notice of the preliminary objection to be made. It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for the prior notice is merely to avoid surprise. But if by the conduct of the opponent it can be inferred that no surprise to him has been caused as in this present case, the objector should be allowed to raise the intended preliminary objection even without any notice as was done in *Jasabena's* case itself. Any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condone illegality simply because no prior notice is given to raise the preliminary objection. Having heard the arguments by the two parties, I allowed the learned counsel for the respondent to raise the preliminary objection *albeit* only a short and oral notice was given to the appellants.

I am in agreement with his Lordship Abdul Kadir Sulaiman as aforesaid.

It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. I am of the view that a preliminary objection on a point of law can be raised even though no prior notice of preliminary objection is given as any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the court in the proceedings. The court cannot condone illegality simply because no prior notice is given to raise the preliminary objection.

Having heard the arguments by the two parties, I allow the learned counsel for the respondent to raise the preliminary objection *albeit* only a short and oral notice was given to the appellant.

Rule 18(4) of the Court of Appeal Rules 1994 has no application to our case.

In the record of appeal (at pp. 49 to 50) there is an undated draft order of the learned Sessions Court judge. In the record of appeal there is no sealed copy of the judgment. I am of the view that the word "decision" in O. 49 r. 6(3)(d) of the SCR could only mean the sealed judgment, that is to say, a judgment that is drawn and entered in accordance with O. 29 rr. 9 and 10 of the SCR. (See *Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Berhad* [1996] 2 CLJ 130).

In *Mat Yassin bin Dollah v. Ibrahim bin Hussin & Anor.* [1997] 2 MLJ 681. His Lordship Nik Hashim JC at p. 684 said:

> Order 49 r. 3A(1) is mandatory in its terms by reason of the word 'shall' in the rule (see *Datuk Bandar Kuala Lumpur v. Seman bin Amat and Other Cases* [1996] 3 CLJ 263). Accordingly, strict compliance with its provision is called for and failure to enclose any one of the items in the record as required by the rule, in my view, will render the appeal record defective. It has been said time and again that rules of court must be obeyed (*Ratnam v. Cumarasamy & Anor.* [1965] 1 MLJ 228) and must be meticulously and faithfully complied with (per Low Hop Bing JC (as he then was) in *S Ravi a/l G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1995] 2 CLJ 152 at p. 154). Failure to comply with them will lead to chaos in the conduct of litigation (*Sykt. Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* [1994] 2 MLJ 420 at p. 423, per Eusoff Chin SCJ (as he then was)).

Thus, without the decision and following *Teoh Soon Kok's* case, I hold that the appeal record in the present case was not properly before the court. The record suffered from a serious defect for not being in compliance with the strict rules of O. 49 r. 3A(1)(d) of the SCR.

I am of the view that O. 49 r. 6(3) of the SCR is mandatory in its terms by reason of the word 'shall' in the rule. So it is a mandatory requirement for the record of appeal to contain the decision appealed from.

It is trite law that an appeal under O. 49 r. 6(3) of the SCR is by way of rehearing before the judge in chambers. However, the judge in chambers can only hear the appeal by way of rehearing if the record of appeal has complied with the strict rules of O. 49 r. 6(3) of the SCR.

In the result, the record of appeal without the decision is incomplete. I hold that the record of appeal in the present case was not properly before the court and this court has no jurisdiction to hear this appeal.

For the reasons stated, I uphold the preliminary objection and I dismiss the appeal with costs to be taxed unless agreed.